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In The Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE VIRGINIA WINERIES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. The Commerce Clause and the Privileges and Immunities Clause Have a "Mutually Reinforcing Relationship" in Prohibiting Discrimination Between the States	3
II. The Privileges and Immunities Clause, as the Commerce Clause, Secures Each Citizen's Right to Engage in Interstate Commerce by Preventing Discrimination Between Citizens of the Several States	9
A. Economic Discrimination Between the States Was Rampant Under the Articles of Confederation	9
B. The Privileges and Immunities Clause and the Commerce Clause Were Adopted in the Constitution to Secure Harmony and Nondiscrimination in Interstate Commerce	11
1. The Founders' Express Intent	12
2. Supreme Court Jurisprudence and Constitutional Scholarship	16
III. In Addition to Violating the Commerce Clause, New York's Discriminatory Restraint on Interstate Commerce in Wine Violates the Privileges and Immunities Clause	19
A. The Right to Engage in Commerce is Secured Under the Privileges and Immunities Clause	20

TABLE OF CONTENTS – Continued

Page

B. The Supreme Court Has Already Invalidated Under the Privileges and Immunities Clause State Regulatory Schemes Similar to New York's Discriminatory Restraint on Interstate Commerce in Wine ... 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Austin v. New Hampshire, 420 U.S. 656 (1975) 14, 15, 16, 20, 22

Bacchus Imports, Inc. v. Dias, 468 U.S. 263 (1984) 2, 5, 9, 12, 24

Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371 (1978) 14, 15, 16

Blake v. McClung, 172 U.S. 239 (1989) 20

Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) 27

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 5

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 4

Coryfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Penn. 1823) (No. 3,230) 5, 9, 17, 20, 21

Craig v. Boren, 429 U.S. 190 (1976) 6, 8

Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003) 18, 24

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 5, 17

Hicklin v. Orbeck, 437 U.S. 518 (1978) ..... *passim*

Hillside Dairy Inc. v. Lyons, 539 U.S. 59 (2003) 4, 5

Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964) 6, 23, 24

Lemmon v. People, 20 N.Y. 562 (1860) 12, 17

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 4

TABLE OF AUTHORITIES – Continued

Page

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).. 4, 5, 15, 16, 17

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) 3, 23

Tangier Sound Watermen's Ass'n v. Douglas, 541 F. Supp. 1287 (E.D. Vir. 1982)..... 5, 21

Toomer v. Witsell, 334 U.S. 385 (1948)..... 2, 5, 21, 25, 27

United Bldg. & Constr. Trades Council of Camden County v. City of Camden, 465 U.S. 208 (1982).....*passim*

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 5

Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949)..... 21

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).....*passim*

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)..... 13

Zobel v. Williams, 457 U.S. 55 (1982) 5, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XXI, § 2..... 8

U.S. Const. art. I, § 8..... 6

U.S. Const. art. I, § 10..... 6

U.S. Const. art. IV, § 2.....*passim*

LEGISLATIVE HISTORY

Cong. Globe, 39th Cong., 1st Sess. 1836 (1866)..... 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001)..... 17

George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 Iowa L. Rev. 351 (1988) 7

Thomas M. Cooley, *Treatise on Constitutional Limitations* (5th ed. 1883)..... 9, 19

Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause*, 88 Minn. L. Rev. 384 (2003) 7

Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425 (1982) 7

M. Farrand, *Records of the Federal Convention* (1911) 11, 13, 14, 16

The Federalist (Clinton Rossiter ed., 1961) 10, 11, 18

James Kent, *Commentaries on American Law* (13th ed. 1884)..... 18

Dwight R. Lee, *The Political Economy of the U.S. Constitution, in The Foundations of American Constitutional Government* 127 (Robert D. Gorgoglione ed., 1996) 11

David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (1994) 13

Note, *Defining the Scope of the Article Four Privileges and Immunities Clause*, 54 U. Cin. L. Rev. 883 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379 (1979)..... 7, 16

Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809 (1997)..... 7, 19

Joseph Story, *A Familiar Exposition of the Constitution of the United States* (1840)..... 18, 27

Joseph Story, *Commentaries on the Constitution of the United States* (1833)..... 10

Laurence Tribe, *American Constitutional Law* (2d ed. 1988)..... 8

George Washington, *Farewell Address, in* 4 Annals of Cong. 2869 (1797)..... 13

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969)..... 11

INTEREST OF *AMICUS CURIAE*[1]

The Virginia Wineries Association is a professional trade organization that represents the interests of Virginia wineries and promotes the growth and economic sustainability of the Virginia wine industry. The Association currently represents as active members 72 of Virginia's 87 licensed wineries. Its membership comprises sole proprietorships, partnerships, and corporations. In representing its members' interests, the Association opposes protectionist State laws, such as New York's licensing scheme, that prohibit its members from competing on an equal footing with wineries in other States. It supports equal treatment under State laws of all wineries in interstate commerce – in Virginia and throughout the nation. Accordingly, it has a direct stake in the outcome of the instant case.

SUMMARY OF ARGUMENT

The United States Constitution guarantees citizens the right to engage in interstate commerce free of discriminatory restraints imposed by protectionist State regulatory regimes favoring their own residents. While this Court has granted review under the Commerce Clause, New York's protectionist scheme is fully exposed

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and their counsel made monetary contribution to the preparation or submission of this brief. As Petitioner Swedenburg is a member of the Association, *Amicus* did not use membership dues to finance this brief; rather, *Amicus* solicited individual contributions from members uninvolved in the litigation. Pursuant to Rule 37.3, *Amicus* states that Petitioners and Respondents have granted consent to file this brief.

as unquestionably unconstitutional only by analyzing it under the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause of Article IV, § 2. *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). The Founders' writings, this Court's jurisprudence, and constitutional scholarship confirm that these two central constitutional provisions share a common history, function, and even the same textual source in the Articles of Confederation – evincing that the Commerce Clause and Privileges and Immunities Clause mutually reinforce the Constitution's mandate to secure comity and nondiscrimination in interstate commerce. *Id.*

In conjunction with the Commerce Clause's "negative" implication, this Court has repeatedly affirmed the right to practice one's commercial calling in interstate commerce as "one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause." *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 219 (1982) (Rehnquist, J.). New York's direct-to-consumer licensing scheme violates this right by exempting in-state wineries from regulation while denying this same economic benefit to out-of-state wineries. Although New York asserts constitutional immunity for this interstate discrimination under the Twenty-First Amendment, this Amendment did not effect a monumental constitutional revolution by annulling the ubiquitous constitutional norm of interstate commercial comity.

New York's protectionist licensing scheme exemplifies the "economic Balkanization" proscribed by this Court in *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263, 276 (1984), and constitutes interstate discrimination that offends the "substantial equality" between the citizens of the several States. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Thus,

this Court should reverse the Second Circuit and hold New York's direct-to-consumer licensing scheme for in-state wineries unconstitutional under the Commerce Clause and, alternatively, under the Privileges and Immunities Clause.[2]

ARGUMENT

I. The Commerce Clause and the Privileges and Immunities Clause Have a "Mutually Reinforcing Relationship" in Prohibiting Discrimination Between the States.

The United States Constitution guarantees citizens the right to engage in interstate commerce free of discriminatory and protectionist State regulatory regimes favoring their own residents.

New York's discriminatory licensing regime exempts in-state wineries from its three-tiered system regulating alcoholic beverages by permitting them to ship wine directly to New York consumers. These direct-shipment licenses are denied to out-of-state wineries, unless they establish a physical presence in the State and thereby become *de facto* New York residents. *See Swedenburg v. Kelly*, 358 F.3d 223, 237-38 (2d Cir. 2004) (describing the discriminatory nature and effect of New York's licensing regime). A State statute that extends a regulatory exemption and economic benefit solely on the basis of the recipient's *in-state residency* is an invalid "law that overtly

[2] Although *Amicus* is filing its brief in this Court's review of *Swedenburg v. Kelly*, No. 03-1274, its analysis applies equally to this Court's review of *Granholm v. Heald*, No. 03-1116.

blocks the flow of interstate commerce at a State's border." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). This Court has repeatedly held such statutes to be "simple economic protectionism" proscribed by "a virtually *per se* rule of invalidity." *Id. See also New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988) (applying long-standing constitutional rule that "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" are prohibited under the "'negative' aspect of the Commerce Clause").

While this Court has granted review on the Commerce Clause issue, a complete analysis of that question requires an understanding of the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause of Article IV, § 2.[3] *Hicklin v.*

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[3] *Amicus* recognizes that corporations are not entitled to the protections of fundamental rights secured to citizens of the several States under the Privileges and Immunities Clause. *Paul v. Virginia*, 75 U.S. 168, 177 (1868) (noting that the "term citizens . . . applies only to natural persons, . . . not to artificial persons created by the legislature"). New York's prohibition against out-of-state wine producers shipping to in-state consumers, however, does not distinguish between individual or corporate citizens, and thus it applies with equal (unconstitutional) force to an individual or partnership producing wine, as it does to a corporation. In a recent Privileges and Immunities case, then-Associate Justice Rehnquist recognized that "a state may not save its discriminatory regulations by simply hiding its out-of-state discrimination behind a veil of in-state discrimination." *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 221 n.10 (1982). The converse holds true as well: A State may not smuggle past the Constitution impermissible discrimination against out-of-state citizens by including in this discrimination specific types of out-of-state citizens unprotected under the Privileges and Immunities Clause. *Cf. Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66-67 (2003) (holding that state laws lacking any express classification based on individual citizenship may be scrutinized under the Privileges and Immunities

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Orbeck, 437 U.S. 518, 531 (1978). It is no coincidence that Supreme Court cases addressing economically discriminatory regulations by the States implicate both the Commerce Clause and the Privileges and Immunities Clause. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 570 n.4 (1997); *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208 (1982); *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), *overruled on other grounds, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 68-69 (1824); *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Penn. 1823) (No. 3,230) (Washington, Circuit Justice). Even in cases involving only the Privilege and Immunities Clause, this Court has often relied on and "dr[awn] from the reasoning of several Commerce clause cases." *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287, 1300 (E.D. Vir. 1982) (citing cases). *See also Hicklin*, 437 U.S. at 531-32 (relying on Commerce Clause cases to assess Privileges and Immunities claim although "appellants raise no Commerce Clause challenge").

The omnipresence of these two constitutional provisions in challenges to economic discrimination between the States exposes the "fatal defect" in New York's argument. *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263, 276 (1984). The Privileges and Immunities Clause reinforces the Commerce Clause in securing comity and nondiscrimination in

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Clause if the statute's terms "are but proxies for differential treatment against out-of-state residents").

interstate commerce. *See Ward*, 79 U.S. (12 Wall.) at 430 (holding that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business"). Thus, New York's argument that the Twenty-First Amendment immunizes it from constitutional scrutiny under the Commerce Clause also implies immunity from the Privileges and Immunities Clause. But to claim that palpable discrimination is immunized from constitutional scrutiny is anathema.[4] *Cf. Craig v. Boren*, 429 U.S. 190, 205 (1976) (holding that the Twenty-First Amendment does not shield discriminatory State regulations of alcohol from scrutiny under the Equal Protection Clause). *See also Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (rejecting as "an absurd oversimplication," "patently bizarre," and "demonstrably incorrect," a State's claim "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever the regulation of intoxicating liquors is concerned").

This Court has long recognized "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin*, 437 U.S. at 531-32. Contemporary scholarship on the purpose of the Privileges

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[4] The Founders' express intent favoring national uniformity in interstate commerce and nondiscrimination between the States is omnipresent in the Constitution, regardless of whether it is implied in the grants of power to Congress in Article I, § 8, or is expressly enumerated in Article I, § 10, and in Article IV.

and Immunities Clause in Article IV, § 2 confirms this "mutually reinforcing relationship" with the Commerce Clause.[5] *Id.* These two central constitutional provisions – an express restraint on State power with a concurrent grant of power to the national government – serve the Founders' express policy of national uniformity and nondiscrimination in all commercial relations between the

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[5] *See, e.g.*, Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809, 854 (1997) (recognizing that "the purpose the [Privileges and Immunities] Clause was to effect greater commercial union among the citizens of all of the states"); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 Iowa L. Rev. 351, 353 (1988) (suggesting that "the privileges and immunities clause was meant to act as an agreement or treaty, among the states, not to discriminate against trade or business enterprises on the basis of out-of-state residence"); Note, *Defining the Scope of the Article Four Privileges and Immunities Clause*, 54 U. Cin. L. Rev. 883, 884 (1986) (recognizing that "the privileges and immunities clause and the Commerce clause.... were meant to interdict state discrimination against nonresidents that would divide the union to the detriment of the common good"); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 446-47 (1982) (favoring the Privileges and Immunities Clause's "express commands" against "the problem of commercial isolationism" over the dormant Commerce Clause doctrine, which is derived from "the silences of Article I"); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 384 (1979) (noting that "the privileges and immunities clause ... was drafted with interstate harmony and cooperation in mind"). One recent article unintentionally affirms the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause by explaining how one clause cannot do all of the work of the other. *See* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause*, 88 Minn. L. Rev. 384 (2003) (discussing some of the doctrinal differences, such as in the protection of corporations, between the Commerce Clause and the Privileges and Immunities Clause).

States. As the following sections make clear, they share the *same* history, textual source, and function.

It is true that "a constitutional adjustment in the allocation of authority between the federal and state governments" resulted with the enactment of § 2 of the Twenty-First Amendment, which permits States to control importation of alcoholic beverages into their respective jurisdictions. Laurence Tribe, *American Constitutional Law* 475 (2d ed. 1988). But New York may not exploit this express grant of power in the Twenty-First Amendment as a pretext for discrimination. *Id.* at 477-78 ("the amendment does not give blanket power to the states"). *See Craig*, 429 U.S. at 204 (holding that the Twenty-First Amendment is not a safe harbor from judicial scrutiny under the Equal Protection Clause of "invidious . . . discrimination"). New York's discriminatory licensing scheme is not only unsupported by the text and history of § 2 of the Twenty-First Amendment,[6] it is adverse to the Founders'

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[6] New York proffers a self-serving myth of unbridled State power in the regulation and control of the "importation . . . of intoxicating liquors," U.S. Const. amend. XXI, § 2. If § 2 were intended to annul the far-reaching and well-ensconced constitutional norm of nondiscrimination and interstate comity, it would have expressly stated that a State's control of the "importation of intoxicating liquors is valid regardless of any discrimination imposed by a State under this provision." Section 2 does not say anything of the sort.

When placed in its proper historical context, § 2 of the Twenty-First Amendment simply preserves for a State the power to regulate or prohibit *all* manufacture, sale, and consumption of alcohol within its jurisdiction, ensuring that out-of-state producers and merchants have to play by the same rules as their in-state counterparts. Commerce Clause and Privileges and Immunities Clause jurisprudence required this express grant of power to the States, as the States who wished to go "dry" in the late nineteenth century found their efforts frustrated by these constitutional provisions. As Thomas Cooley reports, a State that wished "*altogether* to prohibit the manufacture and sale of intoxicating

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primary concern that the Constitution snuff out the interstate discrimination running riot under the Articles of Confederation. *Zobel*, 457 U.S. at 72 (O'Connor, J., concurring) (noting that discrimination against out-of-state residents "conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States'") (quoting *Paul*, 75 U.S. (8 Wall.) at 180).

II. The Privileges and Immunities Clause, as the Commerce Clause, Secures Each Citizen's Right to Engage in Interstate Commerce by Preventing Discrimination Between Citizens of the Several States.

A. Economic Discrimination Between the States Was Rampant Under the Articles of Confederation.

The Constitution's standardization of interstate commerce arose from the failure of the Articles of Confederation

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drinks as a beverage" often found its attempt to do so "assailed as violating express provisions in the national Constitution, and also as *subversive of fundamental rights*, and therefore not within the grant of legislative power [to the States]." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 718 (5th ed. 1883) (emphases added). *See Corfield*, 6 Fed. Cas. at 551 (describing the rights protected under the Privileges and Immunities Clause as those "which are, in their nature, fundamental"). But Cooley recognized that such regulations are permissible if "[t]hey are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." *Id.* at 720. In other words, § 2 of the Twenty-First Amendment secures for the States the right to restrain within their respective jurisdictions *all* intrastate and interstate traffic in alcoholic beverages under their inherent police power to prevent intemperance, crime, and the other evils that this Court has recognized as the "core concerns" of the Twenty-First Amendment. *Bacchus Imports, Ltd.*, 468 U.S. at 276.

to promote a unified and peaceful economic union. Under the Articles, the national government lacked meaningful authority to enforce its mandates, and despite aspirational provisions promoting interstate commercial comity, States adopted their own parochial monetary, manufacturing, and commercial regulations.

The result was economic bedlam. Justice Story, for instance, reports that under the Articles of Confederation, "[m]easures of a commercial nature, which were adopted in one state from a sense of its own interests, would be often countervailed or rejected by other states from similar motives." 1 Joseph Story, *Commentaries on the Constitution of the United States* 239 (1833). "Such a state of things gave rise to serious dissensions among the states themselves. The difference in regulations was a perpetual source of irritation and jealousy. . . . and thus state animosities and local prejudices were fostered to a high degree. . . ." *Id.* at 240. *See also The Federalist No. 7*, at 63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. . . . naturally lead to outrages, and these to reprisals and wars").

In *Ward v. Maryland*, this Court recounted this history in ascertaining the origin of the Privileges and Immunities Clause. Justice Clifford noted that "[i]nequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." 79 U.S. (12 Wall.) 418 at 431. Justice Clifford continued: "[T]he framers of the Constitution intended to remove those great evils" in adopting provisions forbidding

Congress or the States "to make any discrimination in enacting commercial or revenue regulations." *Id.*

B. The Privileges and Immunities Clause and the Commerce Clause Were Adopted in the Constitution to Secure Harmony and Non-discrimination in Interstate Commerce.

Interstate economic discrimination created the political crisis that led to the 1787 Federal Convention, and to a new Constitution intended to redress this economic and political chaos.[7] *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 463-67 (1969) (describing how State economic regulations created a fundamental political crisis); 3 M. Farrand, *Records of the Federal Convention* 642-43 (1911) (reporting Benjamin Franklin's support for the new Constitution because "our States are on the point of separation, only to meet hereafter for the purpose of cutting one another's throats"). As Justice Denio of the New York Court of Appeals declared in the

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[7] The Federal Convention was actually born of a meeting in 1786 between five States looking "to discuss ways to *reduce trade barriers* between the states. At this meeting the call was made for a larger meeting in Philadelphia in the following year to discuss more general problems with the Articles of Confederation." Dwight R. Lee, *The Political Economy of the U.S. Constitution, in The Foundations of American Constitutional Government* 127, 129-30 (Robert D. Gorgoglione ed., 1996) (emphasis added).

It is, therefore, unsurprising that commerce and its political implications is a recurring theme in *The Federalist*. *See, e.g.*, *The Federalist No. 4*, at 46-47 (John Jay); *The Federalist No. 6*, at 56-60 (Alexander Hamilton); *The Federalist No. 7*, at 62-63 (Alexander Hamilton); *The Federalist No. 11*, at 84-91 (Alexander Hamilton); *The Federalist No. 12*, at 91-96 (Alexander Hamilton); *The Federalist No. 22*, at 143-452 (Alexander Hamilton); *The Federalist No. 42*, at 267-69 (James Madison).

preeminent Privileges and Immunities case, *Lemmon v. People*: "The Constitution organized a still more intimate Union, constituting the States, for all external purposes, and for certain enumerated domestic objects, a single nation." 20 N.Y. 562, 608 (1860).

1. The Founders' Express Intent.

This history is often called upon to explain the basis and function of the Commerce Clause, which, as aptly described in *Bacchus Imports, Inc. v. Dias*, was adopted to "prevent economic Balkanization" among the States. 468 U.S. at 276. This is not a modern insight. The Founders believed the primary function of the Commerce Clause was to restrain State power to impose discriminatory regulations on interstate commerce.[8] James Madison wrote that this central provision of the Constitution

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[8] As noted, securing unrestrained interstate commerce is a fundamental constitutional norm. George Washington emphasized the intimate connection between free-flowing interstate commerce and the preservation of the union in his famous 1797 Farewell Address: "The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism, more than any other appellation derived from local discriminations. . . . [E]very portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole. The North, in an *unrestrained intercourse* with the South, *protected by the equal laws of a common government*, finds, in the productions of the latter, great additional resources of maritime and commercial enterprise, and precious materials of manufacturing industry. The South, in the same intercourse, benefiting by the agency of the North, sees its agriculture grow, and its commerce expand. The East, in like intercourse with the West, already finds . . . a valuable vent for the commodities it brings from abroad, or manufactures at home. The West derives from the East supplies requisite to its growth and comfort." George Washington,

(Continued on following page)

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.[9]

3 M. Farrand, *Records of the Federal Convention* at 478. *See also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting same except for last clause).

Importantly, the *same* historical catalyst underlying the Commerce Clause also led to the adoption of the

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Farewell Address, *in* 4 Annals of Cong. 2871-72 (1797) (emphases added).

[9] Such sentiments were not unique to Madison. In the debate over a draft version of the Commerce Clause, General Charles Cotesworth Pinckney recognized that prejudices between the States abounded, but in "considering . . . the interest the weak Southn. States had in being united with the strong Eastern States, he thought it proper that no fetters should be imposed on the [federal] power of making commercial regulations." 2 M. Farrand, *Records of the Federal Convention* at 449-50. Earlier in the Convention, in response to Roger Sherman's claim that "[t]he States will never give up all power over trade," *id.* at 361, Madison steadfastly maintained that "we aught to be governed by national and permanent views" on the subject of both foreign and interstate trade. *Id.* James Wilson concurred, acknowledging that in "favoring the general power over exports therefore, he opposed the particular interest of his State." *Id.* at 362. While not a delegate at the Federal Convention, Thomas Jefferson, a strong State rights advocate, wrote as early as 1785 that he supported efforts to "take the commerce of the states out of the hands of the states, and to place it under the superintendence of Congress." David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 92 (1994) (quoting letters to Richard Price and James Monroe). Jefferson believed the principal defect in the Articles was its failure to provide Congress with the authority to regulate commerce. *Id* at 91.

Privileges and Immunities Clause. In criticizing the New Jersey Plan – an early draft constitution – Madison highlighted the problem of interstate discrimination as a justification for robust national protection of citizens' privileges in interstate transactions:

> Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other States) are entitled to equality of privileges by the Articles of Confederation.

Austin v. New Hampshire, 420 U.S. 656, 661 n.5 (1975) (quoting 1 M. Farrand, *Records of the Federal Convention* at 317). Whether the Founders called discrimination between the States an "injustice" or a "trespass," the goal of the resulting constitutional provisions, particularly the Commerce Clause and the Privileges and Immunities Clause, was the same: Discrimination in interstate commerce on the basis of citizenship or residency[10] was strictly forbidden.

Beyond their genesis in the same historical problem, the Commerce Clause and the Privileges and Immunities Clause also shared the same *textual source* in the unavailing Articles of Confederation. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 379-80 (1978) (noting that "[t]he Privileges and Immunities Clause originally was not isolated from the Commerce Clause," and that in "the Articles of Confederation, where both Clauses have

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[10] "Citizen" and "resident" are synonymous for purposes of the Privileges and Immunities Clause. *Austin*, 420 U.S. at 663 n.8.

their source, the two concepts were together in the fourth Article"). The fourth article in the Articles of Confederation contained both the Commerce Clause and the Privileges and Immunities Clause, further evidencing the Founders' intent that these two clauses jointly serve "to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union." *Id.* at 379 n.17 (quoting fourth article in the Articles of Confederation).

More importantly for illustrating the textual foundation of the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause, *Hicklin*, 437 U.S. at 531, the portion of the fourth article of the Articles of Confederation that was transformed into the Commerce Clause was itself framed in terms of the Privileges of Immunities Clause: "[T]he people of each State shall have free ingress and regress to and from any other State and *shall enjoy therein all the privileges of trade and commerce. . . .*" *Baldwin*, 436 U.S. at 379 n.17 (emphasis added). The "norm of comity" between the States secured by the Privileges and Immunities Clause, *Austin*, 420 U.S. at 660, applies to all interstate transactions – including commerce. *See Paul*, 73 U.S. (8 Wall.) at 180 (observing that it "was undoubtedly the object of the [Privileges and Immunities] clause in question to place the citizens of each State upon the same footing with citizens of other States").

The splitting of the fourth article in the Articles of Confederation into separate clauses in the Constitution reflects only the Founder's desire for precision and clarity.

The division is in form, not substance.[11] As the Commerce Clause language is an express *grant of power* to Congress and the Privileges and Immunities Clause language is an *express limitation* on State power, the Founders separated them accordingly. *Baldwin*, 436 U.S. at 379-80. *Cf. United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 220 (Rehnquist, J.) (distinguishing "implied restraint" of the Commerce Clause and "direct restraint" in the Privileges and Immunities Clause). In this way, these two clauses better secure the goal of the Constitution in both proscribing economic discrimination between the States and promoting interstate harmony.

2. Supreme Court Jurisprudence and Constitutional Scholarship.

This Court expressly recognized the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause, *Hicklin*, 437 U.S. at 531, in the seminal 1868 case, *Paul v. Virginia*. There, Justice Field cited with approval New York Court of Appeals Justice Denio's opinion that the Privileges and Immunities Clause was intended "to secure a community

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[11] Charles Pinckney stated at the Federal Convention: "The 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, *Records of the Federal Convention* at 112. *See also Austin*, 420 U.S. at 661 (noting that the "[f]ourth article carried over into the comity article of the Constitution in briefer form but with no change of substance or intent"). Pinckney is "generally recognized as the author of the Constitution's privileges and immunities clause." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, at 383.

of intercourse."[12] *Lemmon*, 20 N.Y. at 607 (referencing the precursor to Art. IV, § 2, in the fourth article of the Articles of Confederation). *See also Paul*, 75 U.S. (8 Wall.) at 180 (citing *Lemmon* for the proposition that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this"). As Justice Field further explained: The Privileges and Immunity Clause "inhibits discriminating legislation against [citizens of] other States," and that "without some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul*, 75 U.S. (8 Wall.) at 180.

Justice Field's construction of the Privileges and Immunities Clause was not novel. Justice Washington presaged Justice Field's view of the Privileges and Immunities Clause more than forty years earlier in the equally famous case, *Corfield v. Coryell*, observing that Article IV, § 2, "was manifestly calculated (to use the expression of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and *intercourse* among the people of the different states of the Union.'" 6 Fed. Cas. at 552 (emphasis added). *See also Lemmon*, 20 N.Y. at 627 (Wright, J.) (explaining that the Privileges and Immunities Clause "was intended to guard against a State discriminating in

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[12] In the eighteenth and nineteenth centuries, the term "intercourse" was sometimes used as a synonym for "commerce." *See Gibbons*, 22 U.S. (9 Wheat.) at 189 (noting that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse"). *See also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 113 (2001) (quoting Samuel Johnson's 1785 Dictionary of the English Language).

favor of its own citizens"). And Alexander Hamilton praised the Privileges and Immunities Clause in *Federalist No. 80* as "the esteemed basis of the Union" because it secured "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled." *The Federalist No. 80*, at 478. As one Congressman in 1866 declared with poetic flourish: The Privileges and Immunities Clause in Article IV, § 2, is "the palladium of equal fundamental civil rights for all citizens." *Dickerson v. Bailey*, 336 F.3d 388, 403 n.67 (5th Cir. 2003) (quoting Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence)).

Nineteenth-century constitutional scholars likewise shared in this common understanding of the purpose of the Privileges and Immunities Clause as securing nondiscrimination in interstate commerce. Justice Story believed that, but for the Privileges and Immunities Clause, "the States would be at liberty to make laws, giving preferences of rights and offices, *and even privileges in trade and business*, to those, who were Natives, over all other persons, who belonged to other States." Joseph Story, *A Familiar Exposition of the Constitution of the United States* 291 (1840) (emphasis added). Such "*invidious discriminations* between citizens of different States. . . . would have a tendency to generate jealousy and discontents, [being] injurious to the harmony of all the States." *Id.* at 291-92 (emphasis added). Chancellor Kent reported that the Privileges and Immunities Clause guarantees "if [citizens] remove from one state to another; they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other." 2 James Kent, *Commentaries on American Law* 72 (13th ed. 1884). Finally, Thomas Cooley explained that many constitutional "provisions have for

their object to prevent discrimination by the several States against citizens and public authority and proceedings of other States," including the "provision[] that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Thomas M. Cooley, *Treatise on Constitutional Limitations* 21-23 (5th ed. 1883).[13]

In sum, given their common source in the fourth article in the Articles of Confederation and their common purpose as a remedy to the interstate economic strife plaguing the nation under the Articles, the Commerce Clause and the Privileges and Immunities Clause are both intended to enforce the constitutional norm that the States are forbidden from discriminating against citizens in interstate commerce. Regardless whether a State is restrained either by conceding to an exclusive grant of power to the national government or by accepting a restraint imposed on it that it must respect each citizen's equal rights, the policy is the same – interstate comity and nondiscrimination.

III. In Addition to Violating the Commerce Clause, New York's Discriminatory Restraint on Interstate Commerce in Wine Violates the Privileges and Immunities Clause.

Analysis under the Privileges and Immunities Clause consists of a two-step inquiry: (1) Does a State law burden

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[13] One modern commentator notes that Justice Cooley expressly maintained that the Privileges and Immunities Clause and the Commerce Clause "were designed to facilitate commerce among the states." Smith, *The Privileges and Immunities Clause of Article IV, Section 2*, at 839 n.81 (discussing Cooley's analysis of the Supreme Court's decision in *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870)).

or infringe a privilege and immunity that is secured under Article IV, § 2; and (2) if so, does the State have a "substantial reason" for the discriminatory treatment and does "the degree of discrimination bear[] a close relation" to this reason. *United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 218, 222 (quoting *Toomer*, 334 U.S. at 396). Given the purpose of the Privileges and Immunities Clause to protect fundamental rights, *Corfield*, 6 Fed. Cas. at 551 (describing the rights protected under the Privileges and Immunities Clause as those "which are, in their nature, fundamental"), the second prong is "substantially more rigorous" than review of State laws in other areas of constitutional law. *Austin*, 420 U.S. at 662-63.

A. The Right to Engage in Commerce is Secured Under the Privileges and Immunities Clause.

Despite some ambiguity on the fullest reach of the Privileges and Immunities Clause,[14] this Court has consistently recognized that this provision secures the right to pursue one's trade in interstate commerce. As then-Associate Justice Rehnquist explained in *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*: "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." 465 U.S. at 219 (citations omitted).

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[14] This Court has never provided a definitive list or precise definition of the specific "privileges and immunities" secured under Article IV, § 2. *Blake v. McClung*, 172 U.S. 239, 248 (1898).

In *Corfield v. Coryell*, the first decision addressing the Privileges and Immunities Clause by a Supreme Court Justice (riding circuit), Justice Washington identified in a nonexclusive list, "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise," 6 Fed. Cas. at 552. And in the preeminent twentieth-century case, *Toomer v. Witsell*, Justice Frankfurter summarized the Court's decisions, stating that "they bar a State from . . . discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens." 334 U.S. at 408 (Frankfurter, J., concurring). *See also Ward*, 79 U.S. (12 Wall.) at 430 (holding that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business"); *Valle v. Stengel*, 176 F.2d 697, 703 (3d Cir. 1949) (stating that "[i]t is clear that the Supreme Court has held that the words 'Privileges and Immunities' of Article IV, Section 2, protect the right of a citizen to engage in lawful commerce, trade or business without molestation or harassment"); *Tangier Sound Watermen's Ass'n*, 541 F. Supp. at 1298 (recognizing that the Court consistently strikes down discriminatory State statutes that "involve[] a person's 'commercial livelihood' ").

B. The Supreme Court Has Already Invalidated Under the Privileges and Immunities Clause State Regulatory Schemes Similar to New York's Discriminatory Restraint on Interstate Commerce in Wine.

This Court's 1870 decision in *Ward v. Maryland* speaks directly to the unconstitutionality of New York's

present-day discriminatory scheme. There, Maryland imposed a graduated license fee on traders working in the State based on the size of a trader's stock. Plaintiffs challenged the licensing statute as "repugnant" to both the Commerce Clause and the Privileges and Immunities Clause as it burdened out-of-state traders who wished to sell their goods in Maryland. *Ward*, 79 U.S. (12 Wall.) at 425. Such traders naturally had a larger stock than in-state traders, particularly those who sold liquors. *Id.* at 426. Thus, under Maryland's licensing statute, they would *always* pay a higher license fee than their in-state competitors, thereby undermining their ability to compete with in-state traders. The *Ward* Court held that it was unnecessary to reach the Commerce Clause claim, *id.* at 428-49, as the licensing statute was indeed "repugnant" to the Privileges and Immunities Clause. *Id.* at 429. Although there was no express discriminatory language in the licensing scheme, the Court inferred its palpable purpose in "that the statute in question does discriminate in favor of the citizens of the State." *Id.* at 426. *See Austin*, 420 U.S. at 663 (discussing *Ward* as an example of the Court's "heightened concern for the integrity of the Privileges and Immunities Clause").

The *Ward* decision is directly relevant to the instant case for two reasons. First, this Court explicitly rejected the *same* alleged justification proffered today by New York. Maryland's Attorney General argued before the *Ward* Court that "[t]here is nothing in the law which prohibits or restrains non-resident merchants, manufacturers, or traders or their agents, from bringing their goods here and selling them . . . as residents of the State." 79 U.S. (12 Wall.) at 422. Similarly, the Second Circuit approved New York's direct-shipment licensing

scheme in the instant case because it did not prohibit out-of-state wine producers from becoming *de facto* New York residents. *See Swedenburg*, 358 F.3d at 237 (describing the requirement of New York's direct shipment statute that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license *as long as the winery establishes a physical presence in the state*") (emphasis added). The *Ward* Court rejected Maryland's excuse, recognizing its licensing scheme as invalid interstate discrimination under the Privileges and Immunities Clause. This Court should reject New York's identical attempt today to acquit itself of its constitutional obligations to respect its sister States and their citizens. *Cf. Hicklin*, 437 U.S. at 524-25 (recounting the facts and holding of *Ward* as "strongly support[ing]" the Petitioners' successful Privilege and Immunities claim).

Nor can New York argue that the Twenty-First Amendment effected a wide-ranging and momentous constitutional transformation, prohibiting judicial scrutiny of interstate discrimination on alcohol imports. In essence, New York would have this Court accept that the Twenty-First Amendment has *pro tanto* repealed every clause of the Constitution proscribing interstate discrimination with respect to alcoholic beverages. Thus, New York asserts that this Court must turn a blind eye to its interstate economic discrimination, no matter how egregious, because the subject matter is somehow related to alcohol. *See Swedenburg*, 358 F.3d at 238 (recognizing that "the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol").

This Court's Twenty-First Amendment jurisprudence forecloses this argument. First, in *Hostetter v. Idlewild*

Liquor Corp., this Court labeled as "an absurd oversimplification," "bizarre," and "demonstrably incorrect," a State's argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever the regulation of intoxicating liquor is concerned." 377 U.S. at 331-32. Second, and more recently, this Court held that states may control imports of alcoholic beverages only when such controls serve one of the "core concerns" of the Twenty-First Amendment, such as temperance. *Bacchus Imports, Ltd.*, 468 U.S. at 276. *See also Dickerson*, 336 F.3d at 404 (reviewing Supreme Court and Fifth Circuit cases applying the "core concerns" test under the Twenty-First Amendment). The reason for the *Hostetter* Court's strong language and the *Bacchus* Court's express recognition of temperance as the "core concern" of the Twenty-First Amendment is straightforward: This Court recognized the implications of unbridled State power to discriminate in interstate commerce in alcoholic beverages. Such a construction of the Twenty-First Amendment fundamentally conflicts with the Commerce Clause, the Privileges and Immunities Clause, and the very concern of the Founders about interstate discrimination that gave birth to the Constitution.

The second reason why this Court should look to *Ward* as determinative is that Justice Bradley's concurrence in *Ward* reiterates the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. *Hicklin*, 437 U.S. at 531. As noted above, Justice Clifford's opinion for the Court recognized that there was a Commerce Clause problem with Maryland's discriminatory licensing scheme, but he did not consider it necessary to reach this issue as the Privileges and Immunities claim was dispositive. Justice Bradley,

though, felt it necessary to emphasize in a brief concurrence that Maryland's scheme was indeed "in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States." *Ward*, 79 U.S. (12 Wall.) at 432 (Bradley, J., concurring). Directly paralleling New York's requirement for out-of-state citizens and wineries today, Justice Bradley summarized the constitutional defect in Maryland's licensing statute: "Such a law would effectually prevent the manufactures of the manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders." *Id.* Justice Bradley thus confirmed that Maryland's scheme violated *both* the Commerce Clause and the Privileges and Immunities Clause by imposing discriminatory and protectionist restraints on interstate commerce. The same must be said of New York's discriminatory prohibition here – particularly since New York permits *in-state* residents to engage in commercial activity prohibited to *out-of-state* residents. *See United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 208 (citing *Ward*, among numerous other cases, for the proposition that the Privileges and Immunities Clause protects a citizen's "basic and essential activity" in the "pursuit of a common calling").

Finally, the non-deferential scrutiny applied in *Toomer v. Witsell* should likewise be applied to New York's licensing scheme today. Similar to New York's arguments before the Second Circuit, South Carolina claimed in *Toomer* a valid constitutional purpose in enacting a statute that discriminated against out-of-state citizens. *Toomer*, 334 U.S. at 398 (noting South Carolina's "argument assumes

that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause"). *See Swedenburg*, 358 F.3d at 237-38 (accepting New York's assertion that its prohibition against direct-to-consumer imports is necessary to ensure "accountability" in alcohol distribution in the State). As in *Ward*, the *Toomer* Court rejected South Carolina's purported justification for discrimination: "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger presented by noncitizens, as a class, and the severe discrimination practiced upon them." *Toomer*, 334 U.S. at 399.

Toomer reminds the States that their statutes are not entitled to deferential review under the Privileges and Immunities Clause, as permitting the States to discriminate against the right to engage in interstate commerce would undermine one of the primary justifications for the Constitution. As this Court recognized in *Austin v. New Hampshire*, given "the individual's right to nondiscriminatory treatment" and "the structural balance essential to the concept of federalism" inherent in the Privileges and Immunities Clause, the standard of review is "*substantially more rigorous*" than in other constitutional areas, such as reviewing an exercise of a State's power to tax. *Austin*, 420 U.S. at 662-63 (emphasis added).

Thus, under § 2 of the Twenty-First Amendment's grant of power to New York to control imports of alcoholic beverages, this Court should demand that New York adduce evidence that its discrimination against out-of-state citizens' right to trade with New York consumers "bears a close relation," *Toomer*, 334 U.S. at 396, to the "core concerns" of the Twenty-First Amendment. *Bacchus Imports, Ltd.*, 468 U.S. at 276. New York failed to – and

cannot – produce such evidence, and its conclusory assertion of "accountability" fails its burden under the Privileges and Immunities Clause. This Court again should refuse to close its eyes to the reality of New York's direct-to-consumer licensing statute, recognizing the "severe discrimination" imposed on out-of-state citizens seeking to engage in their right to practice their commercial calling. *Toomer*, 334 U.S. at 399.

Section 2 of the Twenty-First Amendment grants New York the power to ban all imports of alcohol as an essential element of an in-state prohibition against commerce in and consumption of alcoholic beverages, but it may not use this grant of power as a pretext for discrimination. *Cf. Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.) (incorrectly rejecting the "core concerns" test as not reflecting the original intent of the Twenty-First Amendment, but still recognizing that Indiana may not "use[] its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states"). New York's prohibition against direct-to-consumer imports of wine should be invalidated as "repugnant" to the Commerce Clause, *Ward*, 79 U.S. (12 Wall.) at 429, and as an "invidious discrimination" that offends a fundamental privilege secured under the Privileges and Immunities Clause. Story, *A Familiar Exposition of the Constitution* at 291. The constitutional norm favoring "substantial equality" between the citizens of the several States, *Toomer*, 334 U.S. at 396, as expressed in the "mutually reinforcing relationship," *Hicklin*, 437 U.S. at 531, between the Commerce Clause and the Privileges and Immunities Clause demands no less.

CONCLUSION

For these reasons, *Amicus* urges this Honorable Court to reverse the decision below.

Respectfully submitted,

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